properly balancing the interests of cable operators and the public.[15] Moreover, to the extent its decision prevents local governments from collecting fees for use of public rights-of-way, the effect may be to limit or eliminate programs that are encouraging broadband deployment and use. The Commission cannot lose sight of the fact that local governments are custodians of the public interest, directly accountable to the people. Local elected officials are motivated not by a short-term desire for profit, but by the long-term health of their local economies and social structures. The Commission should not establish national, preemptive policies – even assuming the Commission has the authority to establish them – where there is no real problem and where there is a need for flexibility.

We urge the Commission to examine carefully the information we have gathered, and to conduct further fact-finding of its own. Whatever problems may confront the deployment of cable modem service, they are not a product of local action; indeed, local actions complement the Commission's overall goals simply because local officials recognize the value of broadband deployment.

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Cable modem service deployment is proceeding apace, as the Commission itself has recognized. The Commission is required to report the state of broadband deployment to Congress, and in accordance with this requirement, has collected and analyzed data on cable modem deployment. The Commission has found and reported to Congress that broadband networks (or advanced telecommunications capability) *in general*, and cable modem facilities in

[15] Thus, for example, operators are citing the Commission's statements in the Declaratory Ruling and refusing to comply with cable modem customer service standards at the same time that the Commission is referring customer complaints to local governments for resolution. *See* discussion *infra*.

particular, are being deployed rapidly.[16] As recently as February of this year, the Commission stated that "we conclude that advanced telecommunications capability is being made available to residential and small business customers in a reasonable and timely manner." Third Report at ¶ 99. None of the Commission's reports concludes that local government actions are a barrier to broadband deployment generally, and instead the reports describe several examples of local governments that have deliberately and successfully taken steps to promote deployment in their communities. Just a few of the Commission's positive statements regarding the state of deployment follow:

- The First Report concluded that as of late 1998 there were at least 350,000 cable modem subscribers and 25,000 ADSL subscribers, and that "deployment of broadband appears reasonable and timely today . . . ." First Report at ¶¶ 91, 98.

- The Second Report found substantial growth in the space of a little over a year: at that time there were approximately 1 million users of advanced telecommunications services, and 1.8 million residential high speed service subscribers. Second Report at ¶ 8. 1.4 million of those high speed users were cable subscribers, and 875,000 of the advanced services users were cable subscribers. *Id.* at ¶¶ 71, 72. Furthermore, "throughout the country, deployment of last-mile facilities [including cable modem facilities] to support advanced services is expanding rapidly." *Id.* at 8. In its list of Commission actions that might accelerate deployment, the Commission did not refer in preemption of local authority.

- In answer to the question "Is advanced telecommunications capability being deployed to all Americans?," the Second Report concluded, in essence, "Yes." The Commission found that "deployment is reasonable and timely overall." *Id.* at ¶ 205. Perhaps the single exception was with regard to rural areas; the Commission concluded that "in all likelihood, market forces alone will not guarantee that many rural Americans will have access to advanced services." *Id.* at ¶ 220. This suggests government action, not preemption, is appropriate.

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[16] *Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Report, 14 FCC Rcd 2398 (1999) ("First Report"); *Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Second Report, 15 FCC Rcd 20913 (2000) ("Second Report"); *Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion*, Third Report, 17 FCC Rcd 2844 (2002) ("Third Report").

- The Third Report tells another chapter in the same story: subscribership for cable modem services continues to grow and broadband networks have been extended throughout the country. 78 percent of the ZIP Codes in the country, serving 97 percent of the population, have at least one subscriber to a high-speed service. Third Report at ¶ 28. As of June 30, 2001, there were almost 5.2 million high-speed lines using cable modem technology, compared to the 1.4 million reported in the Second Order. *Id.* at ¶ 44. 64 percent of those high-speed lines met the Commission's definition of advanced services. Id. In short, says the Commission, "we believe that advanced services are being made available in a reasonable and timely manner." *Id.* at ¶ 89.

- The First Report noted favorably the potential role of local governments. The Commission observed that some municipal utilities were contributing to the deployment of broadband networks by building networks of their own, and added that "we encourage states *to avoid enacting absolute prohibitions on municipal entry into telecommunications.*" *Id.* at n. 172. The Commission also stated that "consultations between actual and potential suppliers of broadband and community leaders in traditionally underserved areas can lead suppliers to more rapid deployment of broadband capability." *Id.* at ¶ 78.

- The Second Report similarly commented favorably on the potential local role, saying that "[l]ocal businesses and governments can have a great impact on both the introduction of advanced services and the degree of ensuing competition." Second Report at ¶ 114. The Commission expressly acknowledged the effects of local franchise agreements in extending cable Internet access to the schools, as well as promoting deployment in general. *Id.* at ¶¶ 134, 136.

- In addition to acknowledging local government contributions, the Second Report notes that the states have actively promoted broadband deployment through such initiatives as the Iowa Communications Network and the Massachusetts Community Network. *Id.* at ¶¶ 138, 148.

- The Third Report observed that "[s]ubscription rates for large business and institutional customers have increased considerably since the Second Report and groups, especially local communities, continue to invest in infrastructure for advanced telecommunications." Third Report at ¶ 93.

- "[S]ome communities have taken specific steps intended to stimulate economic development in their areas such as building high-speed networks, or aggregating demand. For example, Butler County, Ohio, recently announced the development of a fiber optic network connecting businesses, schools, and government offices that is designed to promote economic development in the region." *Id.* at ¶ 96.

- Anticipating the initiation of the Broadband NPRM and perhaps this proceeding, in the Third Report the Commission expresses concern over local control over access to public rights-of-way. *Id.* at ¶¶ 166-168. This mention of the issue, however, fails to

explain why such access is a problem when every ILEC has long had access to the public rights of-way, and the very same report observes that access to cable modem service is available to the vast majority of Americans.

The Commission's findings regarding the rapid growth of cable modem and other broadband networks arc supported by various independent sources. For example:

- Nielsen NetRatings reported on May 20, 2002: that the number of individuals who accessed the Internet via cable modem or other broadband service increased by 58 percent between April 2001 and April 2002. There were more than 25.2 inillion broadband users in April 2002 Pr :ss Release, Nielsen/Net Ratings, Biggest Broadband Cities get Bigger According to Nielsen/Net Ratings: Sixty-live Percent of the Top 21 Local Markets Grow at Least 48 Percent Year-Over-Year (May 20. 2002)

- NCTA reports that, as of December 31. 2001, 70 million homes were passed by cable modem service, and there were 7 2 million cable modem subscribers This compares to 98.6 million homes passed by basic cable service. Because those 98.6 million cable homes represent 96.7 percent of all homes, the 70 million passed by cable modem scrvicc represent about 07 percent of all homes. National Cable Television Association, Industry Statistics. *available at* http://www.ncta.com/industry overview/indStat.cfm?indOverviewID=2.

- According to two leading cable industry publications, the top 25 cable system operators had 5.4 million cable modem subscribers in June 2001. K Honk, the Guide to Broadband Stats and Standings I2 (Kagan World Media and Cable World)(Fall 2001/Winter 2001). The K Hook predicted total cable modem subscribership would reach 7.7 million by the end of 2001. or slightly more than the actual figure reported by NCTA. *Id.* at 28. The K Book also predicted accelerating growth in cable modem subscription rates, projecting a total of 24 million by 2009. *Id.*

- More recent analyses are even more optimistic. The March 12, 2002. issue of Kagan's Broadband Technology estimated that there would be 11.3 million cable modem subscribers this year. and 23.4 million subscribers in 2006.

ALOAP's own fact-lintling effort confirms that cable modem facilities and services have been widely deployed. ALOAP surveyed local governments to determine whether their cable systems hail been upgraded to allow the operator to provide cable inodem services.[17] About 88% of the communities who responded stated that their system had been upgraded

[17] ALOAP asked local governments to respond to a set of questions on this and other topics; to date 465 communities have responded to the survey.

As importantly, the responses showed that regulation and franchising of cable modem service, and imposing franchise fees on cable modem service does not slow or prevent deployment. ALOAP asked local governments whether they had been charging franchise fees on cable modem service prior to the Commission's Declaratory Ruling. The results were:

- About 77.4% of communities had upgraded systems and charged a fee on cable modem revenues.
- About 10.8% of systems have been upgraded, and the communities did not charge a fee.
- The remaining 11.8% of communities have not been upgraded. Of those, somewhat over half stated that they would not have charged a fee on cable modem service; the remainder believed that the fee would have been due.

The Commission's own Third Report supports the conclusion that regulation and franchising of cable modem service, and imposing franchise fees on cable modem service has not deterred cable modem deployment. It states that cable systems accounted for 54 percent of the total high speed lines in the country as of June 30, 2001. Third Report at ¶ 44. ADSL lines accounted for only 28 percent of high speed lines and SDSL fewer than 11 percent. *Id.* at ¶ 48. Overall DSL availability at the end of 2001 was estimated at 45% percent of all U.S. homes. *Id.* at n. 111.

2. *Local regulation of cable modem facilities and service has spurred cable modem deployment.*

Other forms of local involvement in the provision of cable modem service have, if anything, promoted cable modem deployment. For example:

- Cable franchise agreements often establish bandwidth, node size, and other requirements designed to ensure that the system to be built will be capable of providing reliable cable modem services. Franchise agreements often include a categorical requirement to provide some form of Internet/broadband interactive

services. Examples include St. Paul, Minnesota;[18] Ventura, California;[19] and Madison, Wisconsin.[20]

- Agreements may require an operator to serve all entities within its service area, thus preventing the operator from "redlining" and refusing to roll out services in low-income areas. This is true in Ventura, California, where the operator is prohibited from denying access "or otherwise discriminating against Subscribers" based on "race, color creed, national origin, sex, age, conditions of physical handicap." Service may not be denied "because of the income of the local area in which" a potential subscriber resides.[21] It is also true in Arlington County, Virginia, where the franchise states that service will be extended to low income areas at least as quickly as in higher income areas.[22]

- The deployment of cable modem service has been at the heart of many discussions between operators and franchising authorities for nearly a decade. Through the franchising process and enforcement of franchise provisions, communities have required operators to deploy systems capable of providing broadband services by a date certain. In Mentor, Ohio. the franchise contained a clause requiring the operator to maintain the cable system at the state of the art. When the company refused lo upgrade its system, the City notified the company that it was out of compliance with its obligations; the company ultimately agreed to a deadline for upgrading its system

- Some cable lranchise agreements contain provisions designed to ensure that public, educational and governmental users of the system will be able to take advantage of cable's advanced interactive capabilities, so that, as technology evolves, the ability of the community to communicate critical information effectively also will evolve.[23]

- Cable franchise agreements may require the provision of-free cable modem service in schools, libraries and government offices.[24]

[18] St. Paul, MN, Franchise ¶ 300(a)(4)(requiring upgrade, and requiring that after the upgrade the "cable system will be two-way activated" and "must be capable of supporting two-way high-speed Internet access via the cable system."

[19] Ventura, CA, Franchise § 7.1.4 (upgraded cable system must "include the facilities and equipment...required to support broadband interactive cable services").

[20] Madison, WI, Code of Ordinances § 36.23.

[21] Ventura, CA, Franchise § 16.3.

[22] Arlington, VA Certificate of Public Convenience and Necessity, §5.9(c).

[23] Ventura, CA. Franchise § 10.8; Arlington, VA (Exhibit C to Certificate, providing for two-cable modem service for County government use).

[24] Ventura, CA. Franchise § 10.11; Madison, WI, Code of Ordinances § 36.19.

The Commission itself has recognized that such requirements are reasonable, beneficial and promote the goals of the Communications Act. The Commission required provision of limited free cable modem service to schools in its own social contracts and granted some operators relief from cable rate regulation in return for commitments to upgrade their systems to provide cable modem service. In *Social Contract for Comcast Cable Communications, Inc.*, Order, 13 FCC Red 3612 , 3617-18 at ¶ 15 (1997), the Commission found that Social Contract upgrade requirements and requirements for free cable modem service serve "the public interest and the interests of Comcast's subscribers and promote[] the goals enumerated by Congress in the Communications Act of 1934. Absent such requirements, the Commission notes, an operator could "cancel or delay upgrades" to the public's detriment. *Id.*, ¶ 29.

The Commission found it necessary and appropriate to include conditions to prevent Comcast from discriminating in the roll-out of its Internet service. "It is important to ensure that subscribers in economically disadvantaged areas are not left behind in the information revolution." *Id.*, ¶ 59.

3. Local regulation is critical to fair deployment of cable modem service.

As suggested by the above, broad preemption of local authority is likely, if anything, to delay deployment of cable modem services and facilities, and would be inconsistent with the goals of the Communications Act. Local regulation through the franchising process is essential to ensuring that cable modem service is rolled out fairly to all Americans. Furthermore, broad preemption could prevent local governments from carrying out their acknowledged role with respect to *cable services*

The success of cable modem service depends in part on consumers believing that the service will perform as promised, and that the subscriber can obtain remedies if the service fails.

Several local governments -- Fremont, California, being cine example – have worked to develop specific cable modem customer service standards to respond to specific customer concerns regarding service quality Local governments in all regions of the country have received complaints about cable modem service. Indeed, the Commission itself has been referring cable modem complaints to local governments for resolution - thus acknowledging the importance of providing consumers sonic means for obtaining redress of complaints.[25] Customer service is likely to become of even greater concern as operators begin to roll out "tiered pricing" for Internet services. PCWorld reports that operators may soon begin selling three or more levels of service. with varying levels of upstream and downstream speeds: "Cox currently offers its standard cable Internet service at $34.95 a month for 3-megabit-per-second downloads and 256-kilobits-per-second uploads. The company is now testing in several markets a service that offers scaled-back performance: $26 a month lor 256-kbps downloads and 64-kbps uploads."[26] One analyst suggests that such tiered pricing could become the rule, not the exception – but if that is so, consumers will rightfully expect that the service paid for *is* delivered.[27] As a practical matter, local franchising authorities, and not this Commission, that are in the best position to handle customer complaints.

The Commission does not seine the goals of the Communications Act by leaving consumers unprotected – either directly or indirectly Consumers are left unprotected if the Commission prevents local governments from collecting fees required to operate a strong

[25] *See* Declaration of Doris Boris, attached hereto as Exhibit B; Letter from Kenneth S. Fellman, Chairman, LSGAC, to K. Dane Snowden, Bureau Chief, Consumer and Governmental Affairs Bureau, FCC (May 14, 2002), attached hereto as Exhibit C.

[26] http://www.pcworld.com/news/article/0,aid,101580,00.asp.

[27] Receiving the speed they think they are paying for is a major concern of current cable modem service subscribers. *See* Declaration of Todd Berman, attached hereto as Exhibit D; Declaration of Robert Cantu, attached hereto at Exhibit E.

customer service program. Consumers are also unprotected if localities have no enforceable remedies for violation of customer service standards. These remedies are often embodied in franchise agreements.

Operators have engaged in apparent redlining in some communities. In one Los Angeles franchise area controlled by AT&T Broadband, the company upgraded substantial parts of the system serving the franchise area even though (according to the company) it was not obligated to do so. However, one of the lowest-income areas served by the company was left out of the rebuild, and the company now contends that it will take years to provide equivalent service to that area. This is not a question of *subscribers* opting not to take the service; it is a question of

the operator leaving an urban neighborhoods off the information highway. The City is now taking action to force AT&T to stop the redlining. In Broward County, Florida, a report issued last month concluded that AT&T Broadband has concentrated cable system improvements in largely white neighborhoods, leaving minority communities with less opportunity to receive advanced services.[28] A Commission Order which prevented localities from stopping such redlining would hardly serve the goals of the Communications Act. Unfortunately, the Commission's Declaratory Ruling has already potentially opened the door to redlining in many communities. This is because in many communities, "anti-redlining" provisions in franchise agreements prohibit "cable service" redlining. This was not a problem when it was assumed that cable modem service was a cable service.[29] It is a problem now, and it will become a serious problem if the Commission creates any doubt as to local authority to prevent cable modem redlining.[30]

Setting aside such specific problems, a more general problem is created by the fact that cable operators market cable modem service together with other cable services, and cable services and cable modem services are intermingled operationally and technically.[31] For example, a single bill is issued for cable modem service and cable service; joint, discounted rates are offered to cable modem service subscribers who subscribe to other cable services;

[28] Dwayne Campbell, *Report Blasts AT&T Broadband*, South Florida Sun-Sentinel, June 12, 2002 at B1.

[29] *See, e.g.*, Mountain View, CA, Franchise § 5 (*cable service* must be provided upon request to any potential Subscriber); Ventura CA., Franchise § 5 (same).

[30] The redlining issue would not be a problem, for example, if the Commission finds a locality whose franchise was focused on cable services can require an additional authorization if the operator provides *non-cable* services. The additional authorization could then address issues such as redlining with respect to the roll-out of the new service. If the Commission holds that an additional authorization cannot be required, the cable operator will undoubtedly argue that the terms of its franchise preclude (by contract) the unilateral imposition of anti-redlining requirements. Consumer rights ought not to depend on the outcome of that legal battle.

[31] *See* Declaration of Andrew Etter, attached hereto as Exhibit F.

subscribers may be instructed (at least initially) to call the same number for installation and complaints;[32] and outages affecting cable modem service and cable service may generate calls to the same customer service center; cable modem service and cable service share substantial portions of the internal wiring in a home, and so issues affecting wiring for one service (the price for wiring, grounding procedures, requirements for wall-fishing) may affect the other. While there are many unique issues associated with the provision of cable modem service, *see infra*, as a practical matter, this intermingling means there may be no way for a local government to monitor compliance with the Commission's or previously adopted local customer services standards for cable service calls and complaints only. If the Commission preempts local authority to regulate cable modem service, it may undercut the ability of local government to regulate cable service as contemplated by the Cable Act.

4. Preemption would harm local efforts to spur broadband deployment and develop broadband applications.

In a recent Senate hearing, Senator Allen observed "We see that about 70 to 75 percent of Americans have access to at least one type of broadband service, yet only 10 to 12 percent actually subscribe. This would indicate a significant lack of either corporate or business or even consumer demand, and I think that has to be addressed if there's going to be the investment needed for future broadband deployment." Hearing of the Senate Commerce, Science and Transportation Committee, May 22, 2002, at p. 20. According to Rep. Markey, one of the reasons for low demand is lack of critical content on the Internet. *Id.* at 7.

The Commission itself has acknowledged that there are various factors affecting consumer demand. The First Report observed that "the demand for high-speed Internet access is

[32] *Id.* Some operators have used the same customer service representatives to provide technical support for cable modem and cable service; some have used different representatives.

the primary driver of consumer's desire for broadband." First Report at ¶ 86. In other words, if a subscriber is not interested in high-speed access to the Internet, he or she will probably not be interested in a broadband service. The Commission later noted that other reasons for low demand could include computer ownership, the high cost of the service, and the lack of a "killer" application. Third Report at ¶¶ 118 - 24.

Thus, the cable industry (and other broadband providers) face a critical problem: how to stimulate consumer demand for cable modem service. Local governments are not the cause of that problem, but they have actively tried to be part of a solution.

Local governments have long recognized that development of innovative broadband applications may be the key to future economic development, as well as the more efficient use of public money to perform traditional governmental functions. Hence, not only are local governments concerned with the deployment of the systems; they are concerned and heavily involved in promoting use of the systems. PEG access organizations, many of whom receive their funding from franchise fees, are also heavily involved in promoting broadband use throughout local communities. For example:

- In Portland the City has created a large telecommunications carrier network called the Integrated Regional Network Enterprise (IRNE). IRNE serves local government, schools, county government, higher education and public safety. The IRNE consists of a fiber optic backbone providing a series of redundant rings around the region. This fiber backbone was built jointly by the City, various transportation and public safety entities, and municipal utilities. The IRNE interconnects to both the public switched network and the cable Institutional Networks ("I-Nets") to achieve last mile connections. It is able to offer very high bandwidth data, voice and video on a totally secure, totally redundant network at very low cost, thus encouraging broadband deployment and use. An end user can connect to the IRNE using a cable I-Net connection. But unlike all other I-Nets, the end user is not isolated on the I-Net, and not forced to egress through the cable company's Internet provider. In Portland, the IRNE is connected to all other commercial and non-commercial network service providers by collocating at Internet Hotel meet-me points in the City. IRNE allows users to have direct private WAN connections to ISP's of choice at an ethernet level interface. There is NO gatekeeping by the cable company, the ILEC, the CLEC or

anyone else. This creates a "perfect" open access architecture that promotes competition in the provision of advanced services to local governments...and ultimately, a successful service provider may be able to expand to provide advanced services throughout the community.

- Grand Rapids, Michigan, has long been served by a non-profit organization, Grand Rapids Public Access Television ("GRTV"), which is responsible for managing the public access channels in Grand Rapids. The organization has evolved from a simple public access video programming production center into the Grand Rapids Community Media Center ("CMC") with community computer facilities, connections to the Internet, a mobile "Internet lab" that functions like the electronic equivalent of bookmobiles, and a wireless network designed to provide ubiquitous community networking.

- The Coral Springs, Florida, franchise requires the Franchisee to construct an institutional network, and allows the local government to market capacity as part of its normal economic development efforts. The City and cable operator share revenues derived from these capacity sales. Thus, the government is in a position to ensure that industries that wish to move into the area are guaranteed the broadband capacity they require. That encourages *economic* growth, and ensures that the Franchisee shares in the benefits from that growth.[33]

- In Tallahassee, Florida, the City has partnered with 20 private businesses to develop a wireless, "Digital Canopy" covering portions of the downtown and providing wireless connections of up to 6 MBps to any citizen who registers with the "Digital Canopy" program. During the pilot project, any citizen who owns a PDA or a laptop with a wireless card can easily register to use the network for free, allowing him/her to access e-mail, chat, download music, or listen to the radio while moving freely through the coverage area.[34]

E-government expenditures have grown briskly. Gartner Dataquest predicts that state and local e-government spending will grow to $6.5 billion by 2005, 35 percent annual growth

[33] *See* Institutional Network Agreement between the City of Coral Springs and Advanced Cable Communications, adopted April 17, 2001.

[34] "The City's commitment as a partner in the pilot has two components: Infrastructure (facility/network access & power supply) and technical services. In the infrastructure component, we provided access points to City-owned fiber that is currently part of the traffic management system to support deployment of the antenna system for the WLAN, and power supply for the equipment associated with each antenna location. We also provided access to City facilities as needed for placement of the antennas and associated equipment. Our commitment in the technical services area includes assistance to the vendor/contractor for siting/placement of equipment, network access and/or power interconnection recommendations, and some limited staff assistance with installation or testing of the WLAN components." City of Tallahassee, http://talgov.com/cityth/utilities/ubes/wlan.html.

from this year's $1.9 billion total. Gartner Dataquest also projects that state and local governments this year will spend more on e-government than the federal government will. These expenditures ripple through the economy. According to rankings from Washington Technology magazine, IBM and Electronic Data Systems are the leaders in state and local e-government revenue, with over $1 billion annual revenue apiece. Accenture, KPMG Consulting, Lockheed Martin, TRW, and Unisys follow with $500 million to $1 billion in revenue. Industry experts and company officials say the main drive in e-government for the next several years will be in bringing traditional applications online, though other opportunities in wireless systems and voting hardware are being tested.[35] Local governments are investing in e-gov initiatives because of the benefits provided to constituents, including: improved citizen access to information; enhanced customer service while supporting higher volumes of transactions with the public; reduced operating costs for providing expanded public access to information and services; improved coininunication and interaction with the community: better education by enabling distance learning and video training, as well as improving connectivity of schools.[36]

For example, the City and County of Denver, Colorado created its Denvergov org website to bring services to its constituents. As of last summer, only 2 years after inception, the website provided 40,000 pages of content lor more than 7,000 user sessions per day.[17] Citizens can pay water bills, register bicycles with the police, download a handicapped parking sign application, and sign up for residential recycling services at the website. In Montgomery County, Maryland, the County created a "portal," or a website that acts as a gateway to

[35] William Welsh, *E-Gov Drives State and Local Market,* Washington Technology, Feb. 19, 2001, Vol 15, No. 22, at 261.

[36] *See* Tony Rybczynski, *Optical Ethernet,* NATOA Journal of Municipal Telecommunications Policy, Fall 2001, at 31.

information and services found on the Internet. This citizen-centric model helps guide the citizen through the County government. As of March 2001, the portal receives 2 million hits a month, with 60,000 unique users per month. 35% of all Department of Recreation registrations were received via the portal, along with 50% of all transit pass sales applications.[38] Citizens can access county traffic cameras and pay property taxes electronically via the website.

Many communities are devoting significant resources to closing the digital divide and are using a variety of resources, including cable system institutional networks, to bring high-speed Internet connections to schools and libraries – and to the patrons of those institutions.[39] But, as the National Research Council concluded, additional efforts and additional resources are

[37] Byron West, *A Content Management Solution the Works*, NATOA Journal of Municipal Telecommunications Policy, Summer 2001, at 11.

[38] Kevin Novak, *E-Montgomery*, NATOA Journal of Municipal Telecommunications Policy, Summer 2000, at 23.

[39] The City of Tacoma, Washington (population 194,000) provides a good example. The City's I-Net connects 300 city agency sites, including the school system, the police and fire departments, parks, public safety, libraries, and others. The I-Net uses fiber optics to provide data and voice services to these locations, and coaxial cable to provide video distribution. The video component supports the transmission of broadcast quality video between city sites and over sixty schools and higher education facilities.

The I-Net system was based on a plan created by representatives of the City's agencies, who worked to identify the needs of the City and each of its agencies. The mission of the I-Net system is to "to provide government and educational organizations with the means to transport voice, video and data, at high industry standards, in a cost effective manner." Not a single government institution, agency or school is more than a quarter of a mile from access to the I-Net. Agencies are responsible for covering the costs of the last quarter mile, their end user equipment, installation and testing, as well as a monthly fee. The I-Net enables users to share resources, connecting multiple locations in a seamless pattern into a single operation. This system has enabled users to move the computer and telephone and video programming or training services off commercial or leased phone lines at a considerable cost savings to the agencies, and in turn, the taxpayers of Tacoma.

The City of Santa Clara, California (population 102,000) has a different system, that addresses this much smaller city's needs. The Santa Clara I-Net connects 36 sites to a central facility. These sites include libraries, county facilities, fire stations, and all high schools. The I-Net is connected to the Internet; so by connecting the library to the I-Net, the community is able to provide a high-speed connection to the Internet for researchers and for members of the community who could not afford such a connection to their homes or businesses.

See National Research Council. *Broadband Bringing Home the Bits,* National Academy Press (2002) at 206, for other examples.

necessary at the local level to encourage development of competitive broadband facilities and applications.[40] Allowing local governments to charge a fair rent for use of the public rights-of-way is critical to these efforts, as well as to the effort described in Part II A 3. In order for local governments to respond to customer complaints about cable modem service, local governments must have the funding necessary to do so.[41] Some of the work associated with overseeing cable modem customer service would overlap work associated with overseeing customer service standards that apply to traditional video services.[42] But there will be differences as well because there are some problems (such as the failure of a provider to deliver the upstream and downstream transmission promised) which have no ready analogue in the video programming world.[43] Cable modem service calls may present different technical issues (as where a customer complains about computer configuration) that are likely to present unique difficulties. Monitoring cable modem customer service will require resources – and allowing localities to charge a rent for use of the public rights-of-way allows localities to develop those resources.

Similarly, efforts to spur broadband deployment require resources. Grand Rapids Community Media Center had been receiving approximately $60,000 per year from franchise fees paid on cable modem services. The loss of those funds will have serious consequences for the Mobile Learning Lab sponsored by the Community Medical Center in Grand Rapids. The mobile lab brings laptop computers and digital cameras into schools and neighborhood centers in

[40] *Broadband Bringing Home the Bits* at 4, 36, 107. The Council suggests that if they are permitted to take advantage of cable's capabilities, PEG programmers may be able to provide a unique, local content driven broadband application that spurs consumer demand for broadband.

[41] Letter from Kenneth S. Fellman, Chairman, LSGAC, to K. Dane Snowden, Bureau Chief, Consumer and Governmental Affairs Bureau, FCC (May 14, 2002), attached hereto as Exhibit C.

[42] For example, cable modem subscribers complain of inaccurate or misleading advertising materials. *See* Cantu Decl.; Bauman Decl. These and other general consumer protection matters are currently addressed in many franchises, or in local consumer protection ordinances.

[43] *See* Cantu Decl.; Bauman Decl.

low-income neighborhoods that have little access to such technology, and provide training in an attempt to close the digital divide.[44] Portland's IRNE requires additional funds to serve all the locations it should: for example there are isolated schools in the region that have no access to the Internet by private providers and which cannot be served by IRNE without significant fiber extensions. When the FCC limits funds available to cities, it limits funds available to expand and develop programs like IRNE.

Based on industry-estimated subscriber counts,[45] localities will lose approximately $284 million this year and between $550-$825 million in 2006 if they cannot collect fees on cable modem service. The City of Portland, Oregon, estimates, conservatively, that it will lose on average $1 million per year over the next six years. Austin, Texas, received $1.2 million in cable modem franchise fees in 2001, and projects a $1.3-$1.4 million budget loss for this calendar year.

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The record shows that (a) cable modem service has been subject to extensive local requirements through the franchising process; (b) these requirements have not deterred the rollout of broadband service; and (c) in fact, local regulation has promoted broadband deployment. Not only is preemption unjustified by the record: the record shows that preemption would actually be counterproductive. As we next show, the Commission's preemptive authority over cable modem service is limited in any event; we are not aware of any local rule that the Commission could lawfully preempt, even if it had reason to preempt it.

[44] Financial problems facing the Community Center are reported by Eric Morath, *Grand Rapids tech center scrambles for future amid federal funding cuts*, Crain's Business Report, May 23, 2002.

[45] Kagan Broadband Technology, March 12, 2002. Morgan Stanley has projected similar results. *Local Governments will Fight Cable Modem Ruling*, Nation's Cities Weekly, May 13, 2002.

B. Localities May Franchise and Regulate Cable Modem Service Providers.

1. Local authority to franchise entities that use and occupy public rights-of-way is a function of state, not federal, law.

Underlying the Commission's preemption questions is the presumption that local franchising powers are derived from the Communications Act. That is not the case. Local governments have long had authority to franchise entities that use and occupy public rights-of-way for private profit, to charge fees for use of the public rights-of-way, and to establish conditions on the franchise grant. A franchise for use and occupancy of public rights-of-way has been treated variously, as a "special privilege" granted to private parties to occupy what is ordinarily *public property* dedicated to *transitory public uses*; or "as functions delegated to private individuals to be performed for the furtherance of the public welfare and subject to public control." 12 McQuillan Mun. Corp. § 34.01. But in any case, a grant (whether from the state or from the locality) is necessary because "[n]o private person can take another's property, even for a public use" except by virtue of a legislative grant from the entity with authority over the property. *California v. Central Pac. R. Co.*, 127 U.S. 1, 40, (1888); *Tulsa v. Southwestern Bell Tel. Co.* 75 F.2d 343, 350 (10th Cir. 1935)("franchise is a special privilege conferred by government upon individuals"); *U.S. v. King County*, 281 F. 686, 689 (9th Cir. 1922) ("To the commonwealth here, as to the king of England, belongs the franchise of every highway as a trustee for the public, and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals, or public roads laid out by authority of the quarter sessions. In England a public road is called the king's highway, and, though it is not usually called the commonwealth's highway here, it is so in contemplation of law, for it exists only by force of the commonwealth's authority." *citing* 1 McQuillin Mun. Corp. § 227

In *City of Dallas* at 348, the Fifth Circuit applied these principles to the Cable Act and cable systems, rejecting the notion that franchising rights arise from Title VI, and that "Section 621 became the exclusive source of local franchising authority over cable operators." *Id.* at 348. The court held that:

> We cannot agree with the Commission's unsupported assertion that local franchising authority arises from § 621. While the agency cites no support for its position, there are persuasive dicta supporting the contrary view that § 621 merely codified and restricted local governments' independently-existing authority to impose franchise requirements. See *National Cable Television Ass'n v. FCC*, 33 F.3d 66, 69 (D.C. Cir. 1994) (noting that one of the purposes of the 1984 Cable act was to "preserve[ ] the local franchising system"); *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 972 (D.C. Cir. 1996) ("[P]rior to the passage of the 1984 Cable Act, and thus, in the absence of federal permission, many franchise agreements provided for [public, educational and governmental access] channels.... Congress thus merely recognized and endorsed the preexisting practice....").

Id.

The Cable Act, properly understood, prohibits certain types of regulation,[46] prescribes procedures for exercising local authority,[47] and specifically preserves other types of regulation from preemption, even in the face of an apparently comprehensive federal requirement.[48] The legislative history suggests that where the Act is silent as to local authority, localities retained their pre-Cable Act authority. 1984 U.S.C.C.A.N. at 4696 ("matters subject to state and local authority include, to the extent not addressed in the legislation, certain terms and conditions related to the grant of a franchise..., the construction and operation of the system..., and the

[46] 47 U.S.C. § 543(a)(franchising authority may regulate rates for cable service and other communications service, but only to the extent provided in § 543).

[47] 47 U.S.C. § 544 (prohibiting locality from establishing requirements for video programming or other information services in a request for a renewal proposal, but allowing localities to enforce requirements for facilities and equipment and for *broad categories* of video programming and other services contained in a franchise agreement).

[48] 47 U.S.C. § 554 (Cable Act EEO provisions are in addition to and not in lieu of local EEO requirements).

enforcement and administration of a franchise." Indeed, 47 U.S.C. § 556 is express on the point. Subsection (a) of that anti-preemption provision provides that state and local control over matters of health, safety and welfare are protected from preemption so long as the regulations are consistent "with the express provisions" of the Act. In the absence of an express provision requiring preemption, therefore, local authority is preserved. The Telecommunications Act, Section 601(c), reaffirmed this approach, making it clear that preemption of local and state authority under that Act must be express, not *implied*.

To be sure, localities are not contending that the Cable Act preserves to them unlimited regulatory authority over interstate, non-cable communications services provided via a cable system. The Cable Act specifically recognized that cable systems could be used to provide non-cable communications services, and the CCPA's legislative history went out of its way to make it clear that the statute was not intended to alter existing authority over such services:

> H.R. 4103 maintains existing regulatory authority over all other communications services offered by a cable system...H.R. 4103 preserves the regulatory and jurisdictional status quo with respect to non-cable communications services

1984 U.S.C.C.A.N. at 4666

The point is that local authority does not depend on an affirmative grant from the federal government particularly as to matters pertaining to the use, occupancy and terms and conditions for use and occupancy of the public rights-of-way. Instead, the reverse is true, and a clear and affirmative statement is required to preempt local authority. Indeed, even if the statute were not clear on this point, the result would be compelled by general constitutional doctrine. The Supreme Court has repeatedly warned against the casual preemption of state or local law, both by federal statutes and by administrative regulations. As the Court stated in *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), "we must assume Congress does not exercise [the power to preempt]

lightly." Congress must make its intention "clear and manifest" if it intends to preempt the traditional powers of the States. *General Elec. Co.*, at 78-79. Further, the rule requires that even where a provision of law expressly preempts, the provision is to be read narrowly, not broadly. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

2. *The Cable Act Does Prescribe Some Limits on Local Authority Over Cable Modem Services, But Affirms Local Authority in Critical Respects.*

There is no clear and affirmative statement in the Cable Act that would permit the Commission to preempt local jurisdiction over non-cable communications services wholesale. Instead, there are several provisions which limit local authority over non-cable communications services, but in very specific and limited ways. That the Cable Act was never intended to provide a basis for preempting local authority over non-cable communications services generally is confirmed by the fact that several provisions of Title VI explicitly permit States and localities to regulate non-cable services. *See, e.g.*, 47 U.S.C. §541(d)(1)(State may require informational tariff for intrastate communications services other than cable services); 47 U.S.C. § 542(h) (fees may be charged for the provision of cable service or other communications service via a cable system by a third party); 47 U.S.C. § 544(b)(1)(facilities requirements may be enforced); 47 U.S.C. § 546(c)(1)(B)(renewal may be denied if the quality of the operator's service, but without regard to the mix or quality of cable service or other services provided over the system, has been reasonable); 47 U.S.C. § 551(applying privacy provisions to any service provided by cable operator, and providing that nothing in the Cable Act prevents a locality from enacting consistent laws for the protection of subscriber privacy); 47 U.S.C. § 554 (local government or locality may enforce EEO requirements); 47 U.S.C. § 552 (locality may establish customer service and buildout schedules of the *cable operator*; consumer protection laws are protected unless "specifically preempted" by the Cable Act); 47 U.S.C. § 542(b) (allowing localities to enforce

proposals made by an operator for providing leased access to the cable system to provide services other than video programming services).

The rate regulation provisions of the Act reach and limit the right of franchising authorities to "regulate the rates for the provision of cable service. *or any other communications service* provided over a cable system *to cable subscribers*." 47 U.S.C. § 543(a) (emphasis added). However, in keeping with the general effort to avoid disturbing the *status quo* with respect to non-cable communications services, Section 543(a) only limits state and federal regulation of the price of cable services. The preemption is limited and specific by its terms, and (as the Commission has recognized) does not reach regulation of charges, such as disconnect charges, which are not charges for the *provision* of the service.

The Commission would have no authority to interfere with local authority under those provisions in any circumstance, but more broadly, for reasons suggested in the prior section, the existence of these provisions confirms that Title VI provides no authority for broader preemption of local authority with respect to non-cable services beyond the preemption that is compelled by the statute.

The section to which the Commission points as a possible source of preemptive authority, Section 624(b), grants the Commission no broad preemptive authority and restricts local authority only in some very limited respects. Section 624, 47 U.S.C. § 544, allows local governments to establish certain minimum requirements in an application for a franchise (referred to in the Act as a "request for proposals"). The Act states (in the language to which the Commission refers) that the application cannot establish requirements for "video programming or other information services." 47 U.S.C. § 544(b). The legislative history explains that the purpose of this provision was to prevent the operator from "being forced to provide specific

programming." 1984 U.S.C.C.A.N. at 4706. The Section is thus a narrow restriction on local government authority. *Storer Cable Communications v. City of Montgomery*, 806 F.Supp. 1518, 1545 (M.D. Ala. 1992); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1189 (D.C. Cir. 1989).

Section 624 is not even intended to act as a ban on service requirements agreed to in a franchise. The Cable Act states that a cable operator who desires a franchise must submit a proposal for "equipment, facilities *and services* ...reasonable in light of future cable-related community needs and interests." 1984 U.S.C.C.A.N. (98 Stat. 2779) at 4711. Section 624 accordingly provides that a franchising authority may enforce provisions that are included in a final franchise for "broad categories of video programming or other services." Far from granting the Commission wholesale authority to preempt franchise requirements for the provision of non-cable services, Section 624 thus allows local authorities to enforce promises made with respect to cable services and non-cable services. *Id.* at 4706. Thus, for example, a requirement that a cable operator provide broadband interactive services such as cable modem service is fully enforceable and protected from preemption under Section 624 whether one assumes that service is a cable service or not.

3. *Title I Does Not Grant the Commission Broad Preemptive Authority Over Local Regulation of Non-Cable, Non-Telecommunications Services.*

The only other possible source for the sort of general preemptive authority to which the Commission appears to be adverting in the NPRM is Title I of the Communications Act. The NPRM cites Sections 1, 2(a), and 4(i) of Title I as providing the Commission with the authority to preempt local regulation of cable modem service. *See* NPRM at ¶ 75. Title I does not provide a generalized source for Commission preemptive authority here, for at least two reasons.

First, the question at the heart of the NPRM is whether local governments may issue franchises and charge rents for use of public property. The authority under Title I, such as it is,

applies to "communication by wire and radio" and to persons engaged in such "communication or such transmission." 47 U.S.C. § 152(a). To note the obvious, the right to grant a franchise with respect to public rights-of-way is not a communication by wire. Nor is a locality, by virtue of providing public property for the use of utilities, engaged in "communication" or "transmission" of information. Title I simply cannot be read to give the Commission plenary jurisdiction over property simply because it *might* be useful (or even essential) to a particular communications provider. If Title I did give the Commission such plenary authority, the pole attachment provisions of the Communications Act, 47 U.S.C. § 224, would have been wholly unnecessary.[49] What is particularly notable about Section 224 is that it includes within its reach "rights-of-ways" controlled by investor-owned utilities, and expressly prohibits the Commission from regulating the rates charged by municipal utilities for their property. It would be odd indeed to read Title I to give the Commission the authority to command municipalities generally to grant access to rights-of-way at a price dictated by the Commission where that right does not exist with respect to municipally-owned utilities.[50]

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[49] The Pole Attachment Act added Section 224 to the Communications Act in response to a determination by the Commission that it had no authority to regulate the terms under which power companies and other private right-of-way owners made their facilities available to cable operators. The Senate Report on the original pole attachment legislation noted that [i]t is only because such state or local regulations currently does not exist that federal supplemental regulation is justified. S. Rep. No. 95-580, at 16-17 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 129-25 Congress did not intend the Commission's power to extend beyond what was explicitly included. As noted in House Committee Report 98-4103 on HR 4103, which contains identical language as to what became 152(a), "[T]he Committee does not intend subsection (a)(1) to give the FCC jurisdiction over other services over which the FCC does not otherwise have jurisdiction, solely because these other services are provided over the same facilities that are also used to provide cable service." H.R. Rep. No. 98-4103 at 95, *reprinted in* 1984 U.S.C.A.A.N. (98 Stat. 2779) at 4732).

[50] The most recent example of the Commission's limited authority in this area is the decision of the 11th Circuit in Southern Co. v. FCC, ___ F.3d__ _, 2002 WL 1299142 (11th Cir. 2002). In that case the court noted that the Section 224's refrence to "poles, ducts, conduits or rights-of-way" does not include electric transmission towers. The courts then do not need the Commission's authority expressly when the Commission engages in regulating the activities of facilities outside the Commission's field, be they electric utilities or local governments.

Second, and more generally, Title I of the Communications Act "is not an independent source of regulatory authority." *California v. FCC*, 905 F.2d 1217, 1240 at n. 35 (9th Cir. 1990), *citing United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). *See also FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) ("without reference to the provisions of the Act directly governing broadcasting, the Commission's jurisdiction under § 2(a) would be unbounded."). *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1484 (D.C. Cir. 1994) ("[T]he Commission's expansive power under the Act does not include the 'untrammeled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority,'" *quoting National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 617 (D.C. Cir. 1976)); *Turner v. FCC*, 514 F.2d 1354, 1355 (D.C. Cir. 1975) ("[T]he Commission must find its authority in its enabling statutes"); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) (striking down Commission rules governing the depreciation of telephone plant that conflicted with state regulations) ("To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress.") *Id.* at 374-75.

Whatever authority the Commission has under Title I is very limited in scope, and cannot be exercised in a way that contradicts the intent of Congress as expressed in the structure of the rest of the Communications Act. Accordingly, in addressing the treatment of cable modem service, the Commission must respect the overall statutory scheme, including the role allocated to local governments. To the extent that Congress has delineated a local role in relation to cable operators, cable systems, and the services they provide -- which it clearly has in Title VI – the Commission can do nothing that contravenes or ignores that role.

Section 4(i) is not to the contrary. Section 4(i), 47 U.S.C. § 154(i), serves only to give the Commission authority in areas necessary to implement the *express* authority given by other sections of the Act. Section 4(i) confers no authority to regulate activities that are not otherwise within the Commission's jurisdictional ambit. *North American Telecomms. Assn. v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985) ("Section 4(i) is not infinitely elastic").

The Supreme Court has held that, under Title I, the Commission may exercise authority that is "reasonably ancillary to the effective performance of the Commission's various responsibilities." *Southwestern Cable Co.* at 178 (1968). The term "ancillary jurisdiction" ultimately derives from this portion of the Court's opinion, but the phrase is actually a misnomer; it should be more accurately referred to as "ancillary authority." The Commission's *jurisdiction* is limited by Section 2 of the Communications Act. The Commission has *authority* to engage in the specific activities set forth in the remainder of the Act; where its authority is not express, it may rely on its ancillary jurisdiction. Note, for example, that the Commission's authority over cable television in *Southwestern Cable* derived from its jurisdiction over broadcasting. As in that case, the Commission's authority over cable modem service must derive from one of the substantive provisions in the Act: presumably either Title II or Title VI.[51]

[51] In *GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), the court found that Section 4(i) did not authorize the Commission to regulate data processing services provided by regulated entities. The court found that the Commission could regulate the offering of data processing services by common carriers because of the Commission's authority over the carriers, but also held that the Commission has no jurisdiction over data processing itself. Data processing involves the transmission of signals over wires, often using the same wires used to transmit communications; if the Commission had the authority to regulate all "instrumentalities" that might be engaged in the transmission of communications, then it would seem that the Commission could have used that authority to regulate the data processing industry; but it did not have that authority. Similarly, in this case, the Commission's ancillary jurisdiction does not allow it to broadly preempt local regulation of cable modem service, in a manner unrelated to its authority under Title II or Title VI.

The purpose of ancillary jurisdiction is to ensure that the Commission can fill in gaps in its authority over entities and activities it is empowered to regulate, *see, e.g., Lincoln Tel. and Tel. Co. v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981) (finding ancillary jurisdiction to impose upon telecommunications carriers interim billing method for interconnection charges); *New England Tel. and Tel. Co., et al. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987) (finding ancillary jurisdiction to order telecommunications carriers to reduce telephone rates), not to expand that authority to include otherwise unregulated entities or activities. Cases relied upon by the Commission[52] involve an exercise of ancillary authority as necessary to establish a coherent scheme of common carrier regulation under Title II. The Commission's exercise of its ancillary jurisdiction was circumscribed: as one Court put it, it was up to the Commission to show that "state regulation would negate valid regulatory goals." *State of California v. FCC*, 39 F.3d 919, 931 (9th Cir. 1994).

Here, the Commission's Declaratory Ruling by its terms limits the permissible scope of the Commission's authority over interstate information services. Title II, and authority ancillary to Title II, are irrelevant under the Declaratory Ruling, because the Commission has decided that the provision of cable modem service does not involve any service subject or even possibly subject to Title II regulation.

Turning to Title VI, the Cable Act itself prescribes the proper balance between the Commission and local governments, and the Commission cannot use "ancillary authority" to upset that balance. To the extent that the Commission is relying on Title I read in conjunction with its authority under Title VI, the short answer is: Title I cannot logically provide broad authority to preempt local government regulation of non-cable communications services that

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[52] *State of California at* 931-33 (9th Cir. 1994); *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 214-218 (D.C. Cir. 1982) *cert. denied*, 461 U.S. 938 (1983)

Congress preserved in Title VI. To the extent that the Commission is not relying on ancillary authority, but is instead claiming an independent right under Title I to regulate all facilities, equipment and persons that have any relationship to communication, the answer is that there is no such authority. Those limits are particularly strong with respect to the franchising and compensation issues raised in the NPRM because resolution of those issues implicates fundamental constitutional issues.

Nor are there other provisions at issue which even arguably permit preemption of local rights with respect to non-cable communications services. Section 706, 47 U.S.C. § 157 nt., orders the Commission to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market" only in the instance where it inquires "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion," and finds that this goal is not being met. The Commission has yet to make a determination that advanced communications is not being deployed in a reasonable and timely fashion. On the contrary, it has found the opposite. *See* Third Report at ¶ 1 (rel. February 6, 2002) and discussion in Part II.A, *supra*.

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In sum, there are no provisions of the Act which give the Commission broad preemptive authority over local governments with respect to the regulation of non-cable communication services, or with respect to the use and occupancy of their public rights-of-way to provide non-cable communications services.[53]

[53] The NPRM is thus significantly and procedurally defective. The Commission has asked parties to identify generally what local regulations should be preempted. The Commission has literally invited an unlimited fishing expedition, without first considering the limits of its authority, the limitations created by the Act, and certainly without providing any notice as to what it might, or might not be considering